money lent with interest thereon: certainly in itself it contains no hint that the plaintiff is suing for damages for breach of agreement. But it does claim a considerable sum of money—rather more than $23,000 in all, and money is always awarded by way of damages. The body of the plaint also discloses a state of facts which, if established by the evidence, amounts to a breach of agreement on the part of the defendant. As to whether those facts have been, or will be established by the evidence I cannot say, since I do not know to what extent the learned Judge accepted the plaintiff's evidence. I will point out, however, that section 106 of the Evidence Enactment provides that "when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." It may well be that the burden of proving that he used his best endeavours to procure the registration of the town lot in question in his own name rests on the defendant.

For these reasons which I have given I think that the learned Judge was wrong in giving "judgment on pleadings," and that this case must be remitted to the Court below to be tried on its merits. I also agree with the order as to costs, proposed by the learned President.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J., WHITLEY & PEDLOW, JJ.

November 20, 1936.

VALLIPURAM SIVAGURU.....Plaintiff-Appellant.

v.

P. C. R. M. PALANIAPPA CHETTY OFFICIAL ADMINISTRATOR AS ADMINISTRATOR OF THE ESTATE OF GAN INN, DECEASED .....Defendants-Respondents.

[NEGRI SEMBILAN CIVIL APPEAL No. 2 of 1936.]

The Land Code (Cap. 138), sections 85, 134 and 155—Unregistered transfer—Lien—Prior equities.

In 1931 G. deposited his issue document of title to land with the first defendant-respondent as security for a loan and in 1932 sold the same land to N explaining the absence of the issue document of title by a false statement that it was lost. On account of the absence of the issue document of title N could not obtain registration of the transfer on sale and in consequence lodged a caveat against the land under section 165 of the Land Code. G died in 1932, shortly after executing the transfer in favour of N, and in 1933 the first defendant-respondent lodged a caveat under section 134 of the Land Code claiming a lien by deposit with him of the issue document of title. At the end of 1933, N executed a transfer of this land in favour of the plaintiff-appellant and N died in June, 1934. In August, 1934, this land was transmitted to the second defendant-respondent as administrator of G's estate.

Held, that the first defendant-respondent had acquired, by the deposit with him of the issue document of title, the right to a lien over the land by registering at any time a caveat under section 134 of the Land Code (Cap. 138). That as between the first defendant-respondent and the plaintiff-appellant the former had the prior equity and that his delay in presenting his caveat for registration was not an omission which operated and enured to forfeit and take away his pre-existing equitable title.

Held further, that N could not have obtained a decree for specific performance against G so long as the issue document of title remained deposited with the first defendant-respondent and therefore the plaintiff-appellant could not obtain a decree directing the second defendant-respondent to transfer the land to him unencumbered by the lien.

Decision of Aitken, J. in *Vallipuram Sivaguru* v. *Palaniappa Chetty* (1936) F.M.S.L.R. 109; 5 M.L.J. 199 affirmed.

E. Jeff for plaintiff-appellant.

A. J. Bostock-Hill for the first defendant-respondent.

Second defendant-respondent absent.

Cur. Ad. Vult.

TERRELL, AG. C.J.—In this case I find myself so entirely in agreement with the decision of the learned trial Judge and with the reasons which he has given that there is very little which I wish to add. There are, however, one or two points which were argued in the Court of Appeal, but which, if raised, were not stressed in the Court below. They are accordingly not referred to in the grounds of judgment.

For the sake of clarity I will recapitulate from the written judgment the principal dates as therein set out.

January 19th, 1931.	Gan Inn executes the promissory note in favour of the first defendant, and deposits the issue document of title to Lot No. 297 in the Mukim of Ayer Kuning with the first defendant as security for repayment of loan and interest.
March 17th, 1932.	Gan Inn sells and purports to transfer Lot No. 297 to Nagappa Eliathamby.
March 21st, 1932.	Nagappa Eliathamby lodges a caveat which is registered on the same day.
April 6th, 1932.	Gan Inn dies.
August 22nd, 1933.	Palaniappa Chettiar, the first defendant, lodges a caveat which is registered the same day.
Dec. 8th, 1933.	Nagappa Eliathamby sells and purports to transfer Lot No. 297 to Sivaguru Vallipuram the plaintiff.
June 15th, 1934.	Nagappa Eliathamby dies, and no personal representative of his estate has yet been appointed.

August 14th, 1934.	Lot No. 297 is transmitted to the Official Administrator as the Administrator of the Estate of the late Gan Inn deceased.
Dec. 30th, 1935.	Palaniappa Chettiar, the first defendant, commences his action against the Official Administrator in his capacity of Administrator of the estate of the late Gan Inn, deceased.
January 20th, 1936.	Sivaguru Vallipuram lodges a caveat which is registered on the same day.

During the hearing before Aitken J., it became obvious that the plaintiff could not succeed on his original claim. It is true that the transfer of the 17th March, 1932, by Gan Inn in favour of Nagappa Eliathamby is in the form required by the Land Code, but it could never have been registered without the production of the issue document of title (see sections 87(i), 89 and 90(ii) of the Land Code). In any case the transfer could not have been registered after the death of Gan Inn, and if the transfer had by inadvertence been registered, such registration would have been void (section 85 (ii) of the Land Code). The plaintiff himself has no registrable transfer from Nagappa Eliathamby, Exhibit C, the document of the 8th December, 1933, not being in the form required by the Land Code; consequently it can only be regarded, as the learned trial Judge regarded it, as an equitable assignment of Nagappa Eliathamby's rights, such as they were, under Exhibit A. Plaintiff's counsel accordingly applied to amend, and add in the alternative a prayer that the second defendant, as representing the estate of Gan Inn deceased, be ordered to transfer the land in question to the plaintiff unencumbered by any lien.

The question whether this amendment should be allowed was left to be decided later by the learned trial Judge, and, subject to that, the case was argued on the footing that the amendment had been allowed. In his written judgment the learned trial Judge considered that the amendment was a proper one, but he has given reasons why, even so, the plaintiff cannot succeed. I would, however, point out that the plaintiff himself could not sue as the assignee of Nagappa Eliathamby's right without joining the representative of Nagappa Eliathamby's estate as plaintiff, as there was at the time no provision in the Land Code of the Federated Malay States that the assignee of a chose in action could sue in his own name without joining his assignor—see *Motor Emporium* v. *Arumugam*, (1933-1934) F.M.S.L.R. 21; 2 M.L.J. 276. This defect in the law has now been remedied by Enactment No. 18 of 1936. In any case it would have been a purely technical objection which was not raised by defendants' counsel in the Court below, except in so far as paragraph 9 of the first defendant's written statement alleged that there was no contractual relation between the plaintiff and the second defendant. If this objection had been pressed, the matter could have been put right without much difficulty.

I will accordingly treat the plaintiff's alternative claim as being formally in order. and as such, it can only be regarded as a claim for specific performance of a contract, that is to say as a claim for some form of equitable relief. When looked at in this light, it becomes clear that the claims of the plaintiff and the first defendant are claims resting on conflicting equities, and that neither party can claim any priority by virtue of registration under the Land Code. In dealing with conflicting equities, the fundamental maxim that applies is "*qui prior est tempore, potior est jure*," unless the party having the prior right in point of time, has done anything to forfeit his priority.

In this connection it will be useful to refer once more to the chronological list of dates. It will be seen that the first defendant acquired the first right by virtue of the deposit of the issue document of title with him on the 19th January 1931. The learned Judge on this point found as follows:—

> "By the deposit with him of the issue document of title the first defendant acquired a right to present a caveat and so create a lien."

There can, I think. be no doubt that this is so. It is true that section 134 (i) of the Land Code states specifically that no lien is created until a caveat is registered. Before the amending Enactment No. 31 of 1928, the lien was created by the mere fact of deposit, and it may have been the intention of the legislature to put an end to equitable liens such as had hitherto been recognised. But, in the absence of express words, the Courts will not be precluded from doing justice between parties by giving effect to equitable rights by way of contract. I take it therefore that the only effect of the amendment is that no lien is acquired under the Land Code until the caveat is registered but that does not prevent the depositee of the document of title from having some equitable right outside the Land Code, and such right is as stated above.

It is now necessary to consider the effect of the two caveats which were lodged, and it will be seen that Nagappa Eliathamby, the plaintiff's predecessor in interest, lodged his caveat on the 21st March, 1932, nearly 18 months before the defendant lodged his caveat on the 22nd August,

1933. But the two caveats are materially different—they are lodged under quite different sections of the Land Code and their objects are not the same. The first defendant's caveat was lodged under section 134 (i) of the Land Code, and its object is to implement the equitable right which the plaintiff already possessed by giving him a statutory lien. Upon obtaining such lien he obtained a registered interest in the land. It is true that this particular caveat should not have been registered, as Gan Inn the caveatee was then dead, (see section 155 of the Land Code, which prohibits any dealing with the land after the death of the proprietor until a transmission to the representative has been registered), but unlike section 85, which renders void any instrument executed by the proprietor and not presented until after his death, there is nothing in section 155 to render the registration of the caveat void, although its representation is prohibited. In my view, however, the matter is of little importance, as even if the registration of the original caveat by the first defendant were set aside, there is no time limit under section 134 (i) for the presentation of the caveat. A fresh caveat could accordingly be presented and registered, and immediately upon the registration thereof, the original equitable rights of the first defendant would be implemented, and he would obtain a lien under the Land Code.

The plaintiff's caveat, however, is something quite different. It was presented under section 166 of the Land Code. Under the provisions of that section.

> "any person claiming title to registrable interest in land may present a caveat to the effect that such land shall not be transferred, charged or leased by the proprietor either
> (a) absolutely, or
> (b) except in such manner and to such extent as in such caveat may be expressed, or...." etc.

The caveat itself contains a mis-statement in that it alleges that the caveatee had an interest by virtue of a lien. Putting that aside, what the caveator seeks to prohibit is

> "the registration of any transfer charge or lien.....subsequent to this caveat."

The form of the caveat itself makes it clear that the caveator wished to protect himself against subsequent dealings by the proprietor without notice to him. In the case of Nagappa Eliathamby this was a wise precaution, as the issue document of title had not been handed over. If Gan Inn had deceived Nagappa Eliathamby by falsely pretending that he had lost the issue document of title, he could, in the absence of a caveat, have fraudulently transferred the land to another purchaser, and when such transfer had been registered, Nagappa Elathamby's interest in the land would have been defeated. But the caveat cannot do more than that. It can only affect such interest as Gan Inn had, and prevent subsequent dealings. It cannot have the effect of enlarging such interest retrospectively.

On examination, therefore, it will be seen that the two caveats are not in *pari materia*, they are lodged for quite different objects, and are different in their effect. They are accordingly irrelevant on the question of the priorities between the parties.

This brings me, therefore, to the only remaining issue which was stressed by Mr. Jeff in the Court of Appeal when he argued that by failing to register his caveat earlier, the first defendant had been negligent and lost his priority. This argument is rather different to the argument presented by Mr. Jeff in the Court below, that he was entitled as against the second defendant to specific performance of the contract. On that issue the learned trial Judge quoted a passage from *Howard* v. *Miller*, (1915) A.C. 318, 323, which disposes of it. Shortly the proposition is this—Nagappa Eliathamby himself could not have obtained specific performance against Gan Inn because the remedy would be purely equitable, and no Court of Equity would compel Gan Inn to transfer absolutely to Nagappa Eliathamby property in which he had already given an interest to the first defendant for valuable consideration.

The argument presented to the Court of Appeal is really an argument based on the doctrine of estoppel. That is to say that the first defendant must have been guilty of some negligence or breach of duty which induced the plaintiff, or his predecessor in interest, to alter his position to his detriment. If such a position was established, the first defendant would be prevented from relying on his prior equity. But in fact there is no evidence that Nagappa Eliathamby ever searched the register and found it clear. Even if he had done so, he would still have had to be on his guard owing to the absence of the issue document of title. He should have known that if the title had been deposited as security for a debt, the depositee could at any time register a caveat and obtain a registered lien. Nagappa Eliathamby took the risk of paying his money without obtaining the document of title, and the plaintiff who did the same, cannot blame the first defendant. In fact when the plaintiff paid his money, the first defendant's caveat was already on the register, a circumstance which would in itself deprive the plaintiff of any merits.

The cases such as *Abigail* v. *Lapin*, (1934) A.G. 491, 505 and *Rimmer* v. *Webster*, (1902) 2 Ch. 163 are cases in which the holder of an equity

has parted with the *indicia* of title, thereby enabling a fraud to be perpetrated upon innocent third parties. In such cases the holder of the equity has been held to lose his priority because his negligence has made the fraud possible. The case is quite different when the holder of the equitable right has retained the *indicia* of title. The loss that has fallen on the plaintiff is not due to negligence on the first defendant's part, but entirely owing to the fact that the plaintiff himself and his predecessor in interest neglected the most elementary precaution when they purchased the property.

I would accordingly dismiss the appeal with costs, the deposit to be paid out to the respondent or his solicitor.

WHITLEY, J.—This is one of those unfortunate cases in which one of the two innocent parties has to suffer for the misdeeds of a third party who is now dead. The facts are so fully and clearly set out in the judgment of Aitken, J. that I do not propose to go through them in detail. I will content myself with a reference to those which seem to bear most directly on the point at issue. Gan Inn, since deceased, held a plot of land known as Lot 297 under Negri Sembilan Grant No. 11347. In 1931 he deposited the issue document of title with the first defendant, who is the respondent in this appeal, as security for a loan. The respondent might then have registered a caveat under section 134 of the Land Code, thereby creating a lien over the land but he did not do so. On the 17th March 1932 he sold the same land to one Eliathamby and purported to transfer it, apparently explaining the absence of the issue document of title by a false statement that it had been lost. Eliathamby could not register this transfer as he was not in a position to produce the issue document of title as required by sections 87, 89 and 90 of the Land Code but he did the next best thing by at once registering a caveat under section 166 to the effect that the land should not be transferred charged or leased. In April, 1932, Gan Inn died In December, 1933, Eliathamby sold the land to the plaintiff-appellant. In June, 1934, Eliathamby died and in August, 1934, the land was transmitted to the second defendant as administrator of the estate of Gan Inn, deceased.

Under these circumstances the plaintiff brought this suit claiming a declaration that he was entitled to be registered as proprietor of the land free from encumbrances. In the course of the hearing it became clear that he could not succeed on this claim and an amendment was allowed adding to the plaint an alternative prayer for an order upon the second defendant, in his capacity of administrator of the estate of Gan Inn deceased, directing him to transfer the land to the plaintiff unencumbered by any lien. The learned trial Judge held that the action failed in all respects as against both defendants and against that judgment the plaintiff has preferred this appeal.

The case turns admittedly upon a question of priority of equities. By the deposit with him of the issue document of title the first defendant undoubtedly acquired certain valuable rights, *inter alia* the right to retain the deeds and the right to acquire a lien over the land under the Land Code by registering a caveat under section 134. He can exercise this latter right at any time. As between himself and the plaintiff he admittedly has the prior equity and in the absence of other factors that priority in point of time must prevail. Has he done anything which will postpone his prior equity to the plaintiff's subsequent equity? Mr. Jeff on behalf of the plaintiff-appellant argued that the neglect to put on a caveat was such an omission on the part of the first defendant as to cause him to lose his priority. The system of registration of titles to land in the Federated Malay States being based upon the Australian Torrens System, the judgment of the Privy Council in the case of *Abigail* v. *Lapin*, (1934) A.C. 491 on appeal from the High Court of Australia affords a valuable guide as to the principles to be applied in considering such a question. Lord Wright, at page 501, quotes with approval the following passage from the judgment of an Australian Chief Justice in an earlier case:—

> "It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice."

Later in his judgment Lord Wright goes on to point out that it is clearly established that *prima facie* priority in time will decide the matter unless, as laid down in *Shropshire Union Railway and Canal Co.* v. *The Queen*, L.R. 7 H.L. 496, at page 507, that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave

and strong effect to accomplish the purpose. Now the only act of omission which can be alleged against the first defendant in the present case is his neglect to lodge a caveat under section 134. I cannot conceive that that omission constitutes conduct of a character, to quote the words of Lord Cairns, L.C. in the *Shropshire Union* Case "which would operate and enure to forfeit and take away the pre-existing equitable title." It is not as though he had parted with the document of title, as was done in the *Abigail* case. He retained possession of it throughout and that being so it remained open to him to register his caveat at any time. In my opinion he has done nothing to forfeit his priority.

There is, it seems to me, another insuperable obstacle to the plaintiff's claim. What he is now asking for is in effect a decree of specific performance. As the representative in interest of Eliathamby he stands in the latter's shoes and can have no better rights than he would have had. Eliathamby could only assign to the plaintiff that to which he himself was entitled under his contract with Gan Inn and in my opinion that could not include a right to sue for specific performance when Gan Inn had deposited the *indicia* of title with the first defendant. As the learned trial Judge observed, specific performance being an equitable remedy, any one seeking a decree for the same must show that he is entitled to it in equity. Gan Inn having parted with the document of title Eliathamby could not possibly have been entitled in equity to any such decree. How then can his assignee be so entitled? The first defendant has through the act of Gan Inn become the owner of valuable rights in this land and it would be contrary to all principle for the Court to order the Official Administrator of the estate of Gan Inn to convey an interest which he has not got and which he cannot convey. As Lord Parker observed when delivering the judgment of the Privy Council in the case of *Howard* v. *Miller*, (1915) A.C. 318, 323, there is no principle by virtue of which land can be taken away from the true owner under colour of specific performance of a contract to which he was not a party and which he did not authorise to be made on his behalf. I agree entirely with the conclusions of the learned trial Judge and would dismiss the appeal with costs the deposit to be paid out to the respondent or his solicitor.

PEDLOW, J.—I have had the privilege of reading in advance the judgment of Whitley, J. and I agree, for the reasons set out by him, that this appeal should be dismissed with costs.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION.]

AITKEN, J.

November 27, 1936.

WONG CHIN.....Appellant.

v.

PUBLIC PROSECUTOR.....Respondent.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 74 of 1936].

The Courts Enactment (Cap. 2) section 69 (c)—Extended criminal jurisdiction of First Class Magistrate.

Although the Courts (Amendment) Enactment, 1936 did not repeal section 69 (c) of the Courts Enactment (Cap. 2) yet by repealing section 57 (ii) it has abolished the extended criminal jurisdiction of First Class Magistrates.

Appellant in person.

I. W. Blelloch, Deputy Public Prosecutor, for the respondent.

AITKEN, J.—In this case the learned Magistrate has inflicted a sentence of 18 months' rigorous imprisonment purporting to act under section 69 (c) of the Courts Enactment.

His argument is as follows:—

> "Section 69(c) of the Courts Enactment empowers a Magistrate whose jurisdiction has been extended under section 57 (ii) to inflict a sentence of up to 24 months' imprisonment. Extended criminal jurisdiction was abolished by section 2 (b) of Enactment 15/36. If section 69 (c) of the Courts Enactment is to have any meaning therefore, the reference must be to the extended civil jurisdiction under section 57 (ii), which has not been abolished. Since therefore my jurisdiction has been extended (vide Gaz. Not. 3507 of 21.8.36), I was of opinion that I was empowered to exercise the extended powers conferred by section 69 (c) of the Courts Enactment and accordingly did so."

I agree that it is difficult to explain why the Federal Council should have left paragraph (c) of section 69 of our Statute Book when it abolished the Resident's power to extend a First Class Magistrate's criminal jurisdiction by the Enactment of the 20th of July, 1936, but I cannot agree that because the learned Magistrate's civil jurisdiction has been extended, he can therefore exercise the criminal powers of this paragraph (c). The whole of section 69 of the Courts Enactment deals exclusively with the powers to be exercised by the Courts of the Federated Malay States, in their criminal jurisdiction. In my opinion, therefore, paragraph (c) of that section refers, and can only refer, to an extended criminal jurisdiction of a First Class Magistrate. If, then, that extended criminal jurisdiction has been abolished—as undoubtedly it has, paragraph (c) is left with nothing to which it can refer and has therefore become